IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 985 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MANGABHAI PICHABHAI VASAVA & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS NITA C BANKER for the appellants.
MR KP RAVAL, APP, for the respondent-State.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 14/02/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellants came to be tried for the offence of murder of Bhavsing Pichabhai Vasava, allegedly, committed by them on 23rd June, 1996, at about 15.00 hours, in the outskirts of village Dolatpur of Valiya Taluka of Bharuch District, by appellant No.1, allegedly, causing injury to the deceased on his leg with an axe and appellant No.2 causing injury to the deceased on his neck and head with the help of a 'Koyta" (sugarcane cutting implement) and came to be convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code by Sessions Court, Bharuch, Camping at Rajpipla, by judgment and order dated 25th August, 1999, rendered in Sessions Case No.121 of 1997. Both the appellants were ordered to undergo imprisonment for life and to pay a fine of Rs.1000/- each, in default, to undergo further simple imprisonment for a period of 30 days. They were given the benefit of set off.

2. The prosecution case, in brief, is that appellant No.1 and the deceased are step brothers and they had dispute regarding their respective shares in the lands of their father, Pichabhai. On the day of incident, when the deceased along with his brother, Chandubhai Pichabhai and Kamuben Bhavsingbhai was working in the field, the two appellants came there and told them to leave the field, claiming that the said field had come to their share. It is the

case of the prosecution that Bhavsing and others requested them not to raise any dispute. But, appellant No.1 inflicted a blow on leg of deceased-Bhavsing, as a result of which, Bhavsing fell down and then appellant No.2, Arvind, inflicted 'Koyta' blows on head and neck of the deceased, to which the deceased succumbed on-the-spot within few minutes. Because of the row, many persons gathered and Chandubhai Pichabhai went to Valiya Police Station and lodged a First Information Report. On basis of the said F. I. R., offence was registered, investigation started and, ultimately, charge sheet came to be filed in the Court of learned Judicial Magistrate, First Class, Valiya. Since the offences were triable by Sessions Court, learned J. M. F. C., Valiya, committed the case to the Court of Sessions and Sessions Case No.121 of 1997 came to be registered.

2.1 Charge was framed against the appellants at Exhibit 3 for the offences punishable under Section 302 read with Section 34 of I. P. C. and Section 135 of Bombay Police Act. Both the accused-appellants pleaded not guilty to the charge and came to be tried.

2.2 The Sessions Court, after considering the evidence led by the prosecution, came to a conclusion that the prosecution was successful in proving the charge against the appellants for the offence punishable under Section 302 read with Section 34 of I.P.C. and recorded conviction therefor and passed order of sentence as stated above. The Sessions Court also concluded that the prosecution was unable to prove the charge for the offence punishable under Section 135 of the Bombay Police Act and

recorded acquittal of the appellants therefor. Being aggrieved by the said judgment and order, present appeal is preferred by the convicts.

3. We have heard learned Advocate, Ms. Nita Banker, for the appellants and learned Additional Public Prosecutor, Mr. Raval, appearing for the respondent-State. The record and proceedings are before us and we have examined the same carefully in light of the contentions raised by rival sides.

4. Learned Advocate for the appellant, Ms. Banker, submitted that there was quarrel between the parties on account of property of their common ancestor. There was a quarrel before the incident. The appellants are agriculturists basically and it has come in evidence that their land is located in the vicinity of the place of incident. The incident occurred without premeditation out of quarrel in heat of the moment. Ms. Banker submitted that appellant No.1 is alleged to have caused only one injury on leg of the deceased whereas appellant No.2 is alleged to have caused injury with 'Koyta' to the deceased, which are only two in number and, therefore, intention to cause murder of the deceased cannot be inferred. She submitted that the case cannot fall within the definition of murder. It can at the best be said that it is a case of culpable homicide not amounting to murder and that too, only in respect of appellant No.2.

4.1 Ms. Banker submitted that so far as allegation of having inflicted a blow on leg of the deceased by appellant No.1 is

concerned, it is not corroborated by any contemporaneous and cogent evidence. The medical evidence negatives and nullifies this evidence. Under the circumstance, appellant No.1 cannot be said to have participated in the incident physically. She submitted that there is no material to infer that they had gone to the place of incident with premeditation and, therefore, appellant No.1 could not have been convicted under Section 302 read with Section 34 of I. P. C., inferring that both the accused had common intention and that they were acting in furtherance of their common intention. Ms. Banker submitted that, therefore, conviction of appellant No.1 cannot be said to be well founded either legally or factually and, therefore, the appeal may be allowed.

5. Learned Additional Public Prosecutor, Mr. Raval, has opposed this appeal. According to him, the Trial Court has assessed and evaluated the evidence in its proper perspective. When two persons have gone, one armed with an axe and another armed with a 'Koyta' and when they have inflicted injuries to the deceased, though the injury caused by one may not have been fatal, both the accused can be said to have shared common intention and have acted in furtherance thereof when, ultimately, death of the deceased is caused. He, therefore submitted that the appeal may be dismissed.

6. We have taken into consideration rival side contentions. We find that deceased-Bhavsing Pichabhai Vasava and appellant No.1-Mangabhai Pichabhai Vasava are sons of Pichabhai Vasava, though their mothers are different. Differently put, they are step-

brothers and appellant No.2 is son of appellant No.1. It also appears that the step-brothers were having dispute over their respective share in lands of Pichabhai and the incident occurred when the deceased and his brother, Chandubhai Pichabhai, were working in the field for the purpose of cultivation. It has also come in evidence that land of the appellants is located in vicinity of the area in which the incident occurred.

7. With the above background, if the evidence is seen, we find from medical evidence of Dr. Ajitsinh Chandulal Zaveri (Exhibit 14) and Postmortem Notes (Exhibit 16) that deceased, Bhavsing, had one C.L.W. over left occio-parietal region 8 cms. x 3 cms. in size and deep to the bone of the skull and vertical in direction extending to the outer angle of left eye in the temporal region. The second injury was a chop wound on right side of the neck region extending from middle of the neck and going to the base of the mandible of right side cutting muscles and vessels, which was 7 x 4 x 5 cms. in size. The injuries were ante mortem and were sufficient in ordinary course of nature to cause death. It is, therefore, certain that the death of the deceased was homicidal.

7.1 However, importantly, we notice that apart from the injuries indicated above, no external injuries were found on the lower extremities of the deceased which is the case of the prosecution witnesses against appellant No.1.

8. So far as the incident is concerned, it was witnessed by Chandubhai Pichabhai, who is examined at Exhibit 7 and Kamuben

Bhavsing, who is examined at Exhibit 17.

8.1 Overall reading of evidence of both these eye-witnesses clearly indicates that, according to them, both the accused had come there and asserted their right to cultivate the land in question, which was being cultivated by the deceased and the first informant and, then, appellant No.1 inflicted a blow on leg of the deceased-Bhavsing, as a result of which Bhavsing fell down and then appellant No.2 inflicted injuries on head of the deceased with 'Koyta'. During cross-examination of both the witnesses, no material emerged to suggest that there was a quarrel and that it was sudden or that there was a sudden fight and the appellants acted in the heat of passion upon such a sudden quarrel or that they did not take undue advantage or that they did not act cruelly or in an unusual manner. There is no evidence to show that the appellants were deprived of power of self-control by any provocation offered to them by the deceased and, therefore, we do not find any evidence which would show that the case would fall in any of the exceptions to Section 300 of I. P. C.

9. However, one aspect that cannot be lost sight of is that both the appellants are agriculturists and they were, allegedly, armed with axe and 'Koyta', both of which are agricultural implements. It has also come in evidence that their fields are also located in the vicinity of the field where the incident occurred and, therefore, both the appellants going to the place of incident with axe and Koyta in their hands would not be suggestive of premeditation.

9.1 It is also to be recorded that appellant No.1 is alleged to have inflicted a blow on leg of the deceased with an axe and/or 'Koyta' (there is discrepancy between the evidence of eye-witnesses), but corresponding injury on leg of the deceased was not found by the doctor while performing postmortem. There is no other cogent evidence to show that injury was caused to the deceased by appellant No.1. When the two eye-witnesses assert that the blow inflicted by appellant No.1 was strong enough to make the deceased fall to the ground, some imprints of such injury ought to have been found by the doctor while performing postmortem, which is lacking and, therefore, the evidence of eye-witnesses, in this regard, has to be viewed with caution.

9.2 The first informant-Chandubhai Pichabhai says that appellant No.1 inflicted blow on leg of the deceased with a 'Koyta' whereas Kamuben says that he was armed with an axe and used the same for inflicting blow on the deceased. Therefore, there is a discrepancy in the evidence of eye-witnesses so far as role of appellant No.1 is concerned. We are, therefore, of the view that involvement of appellant No.1 in the incident cannot be said to have been proved by the prosecution satisfactorily.

10. When there is no specific involvement of appellant No.1 in the incident, the question that requires to be examined is whether he could have been convicted under Section 302 read with Section 34 of I. P. C.

10.1 In this regard, we may state that, even if both the appellants are accepted to have gone to the place of incident together, it was natural for them to carry agricultural implements and when it is doubtful as to whether appellant No.1, in fact, inflicted any blow on leg of the deceased, it is unsafe and risky to infer that he shared a common intention with appellant No.2 for the acts of appellant No.2, namely, giving fatal blows to the deceased and, therefore, in our opinion, the Trial Court erred in recording conviction of appellant No.1 under Section 302 read with Section 34 of I. P. C. and, therefore, that conviction deserves to be set aside.

11. So far as conviction of appellant No.2 is concerned, there is consistent evidence of eye-witnesses supported by medical evidence that the deceased inflicted 'Koyta' blows on vital part of the deceased, namely, left occio-parietal region in the form of C.L.W. cutting deep to the bone of the skull causing fracture on skull wall and second injury in the form of chop would on the right side of neck which extended from middle of the neck to the base of mandible of right side. Ultimately, the deceased suffered severe haemorrhagic shock because of chop would in the neck and C.L.W in occio-parietal region, which caused his death. The doctor has opined that the injuries were ante mortem and were sufficient in ordinary course of nature to cause death. When two severe blows are inflicted by a person on head and neck, obviously, an inference about knowledge on part of the assailant that his act is so imminently dangerous and that, in all probability it will cause death of the person or would cause such bodily injury as is likely to cause

death can safely be drawn. In our opinion, therefore, the Trial Court could have convicted appellant No.2, for the murder of Bhavsing, under Section 302 of I. P. C. and not with Section 34 of I. P. C. The conviction of appellant No.2 will have to be altered to one under Section 302 of I. P. C. from one under Section 302 read with Section 34 of I. P. C., while confirming the sentence.

12. For the foregoing reasons, the appeal is partly allowed. C onviction and sentence of appellant No.1 is set aside. Appellant No.1 is ordered to be set at liberty forthwith, if not required in any other case. Fine, if any, paid by appellant No.1 shall be returned to him.

12.1 Conviction of appellant No.2 is altered to one under Section 302 of I. P. C. from one under Section 302 read with Section 34 and sentence imposed by the Trial Court is hereby confirmed.

[A. L. DAVE, J.]

[BANKIM N. MEHTA, J.]

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